Kenmoor International Ltd & Anor v DB Trustee (M) Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22-395 OF 1996
HAIDAR J
19 MAY 1997

Civil Procedure *— Appeal — Notice of — Issue of notice of appeal — When notice of appeal was deemed issued — Notice of appeal was filed, signed and sealed within the time prescribed but was extracted from the court registry after expiry of time limit — Whether notice of appeal was issued out of time — Rules of the High Court 1980 O 56 r 1(3)*

The first defendant brought an appeal against the decision of the senior assistant registrar ('the decision') pursuant to O 56 r 1 of the Rules of the High Court 1980 ('the RHC'). The decision was delivered on 30 January 1997. Accordingly, the notice of appeal was filed and the filing fee was paid on 3 February 1997. On the same day, the notice of appeal was signed by the senior assistant registrar and sealed. However, the sealed copy of the notice of appeal was only extracted from the High Court Registry on 6 March 1997.

The plaintiffs raised a preliminary objection that the notice of appeal was issued out of time as set out under the O 56 r 1(3). The plaintiffs contended that though the notice of appeal was filed on 3 February 1997, ie within the prescribed time, it was only issued to the first defendant on 6 March 1997 thus contravening O 56 r 1(3).

Held, overruling the preliminary objection:

Once the notice of appeal has been filed within the time prescribed and duly signed and sealed within the time frame, then the notice of appeal is deemed to have been issued.

In this case, on the undisputed facts, the first defendant had duly complied with O 56 r 1(3) of the RHC as the notice of appeal was issued (ie signed, sealed and dated) on 3 February 1997 well within the five-day period. The fact that the notice was 'issued' or extracted by the first defendant beyond the five-day period was something beyond the control of the first defendant, and the first defendant could not be faulted just because the court itself had failed to 'issue' the notice of appeal to the first defendant within the time prescribed (see p 424H–I); *Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor* [1981] 1 MLJ 254; *Kok Song Kong v BSP Co Sdn Bhd* [1988] 2 MLJ 440 followed; *Chern Yen Ming & Anor v Teng Ik Ngee Construction Sdn Bhd & Ors (Chern Boon Hong & Anor, Third Parties)* [1996] 4 MLJ 227 not followed.

[Bahasa Malaysia summary

Defendan pertama membuat rayuan terhadap keputusan penolong kanan pendaftar ('keputusan tersebut') menurut A 56 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Keputusan tersebut

disampaikan pada 30 Januari 1997. Lantaran itu, notis rayuan difailkan dan yuran pemfailan dibayar pada 3 Februari 1997. Pada hari yang sama, notis rayuan ditandatangani oleh penolong kanan pendaftar dan dimeteraikan. Namun demikian, salinan bermeterai notis rayuan hanya dikeluarkan oleh Pejabat Pendaftar Mahkamah Tinggi pada 6 Mac 1997.

Plaintif-plaintif membangkitkan bantahan permulaan bahawa notis rayuan dikeluarkan di luar masa seperti yang dinyatakan di bawah A 56 k 1(3). Plaintif-plaintif menghujahkan bahawa walaupun notis rayuan difailkan pada 3 Februari 1997, iaitu dalam tempoh yang disyaratkan, ia hanya dikeluarkan kepada defendan pertama pada 6 Mac 1997 dengan itu melanggar A 56 k 1(3).

Diputuskan, menolak bantahan awal:

Apabila notis rayuan telah difailkan di dalam masa yang ditetapkan dan telah ditandatangani dan dimeterai sewajarnya di dalam masa yang ditetapkan, maka ia boleh dianggap bahawa notis rayuan tersebut telah dikeluarkan.

Dalam kes ini, atas fakta yang tidak dipertikaikan, defendan pertama telah mematuhi A 56 k 1(3) KMT kerana notis rayuan dikeluarkan (iaitu ditandatangani, dimeteraikan dan bertarikh) pada 3 Februari 1997 dalam jangkamasa lima hari. Hakikat bahawa notis itu 'dikeluarkan' oleh defendan pertama selepas tempoh lima hari adalah sesuatu di luar kawalan defendan pertama, dan defendan pertama tidak boleh dipersalahkan hanya kerana mahkamah sendiri telah gagal 'mengeluarkan' notis rayuan kepada defendan pertama dalam masa yang ditetapkan (lihat ms 424H–I); *Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor* [1981] 1 MLJ 254; *Kok Song Kong v BSP Co Sdn Bhd* [1988] 2 MLJ 440 diikut; *Chern Yen Ming & Anor v Teng Ik Ngee Construction Sdn Bhd & Ors (Chern Boon Hong & Anor, Third Parties)* [1996] 4 MLJ 227 tidak diikut.]

Notes

For cases on notice of appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 567–602, 699.

Cases referred to

Chern Yen Ming & Anor v Teng Ik Ngee Construction Sdn Bhd & Ors (Chern Boon Hong & Anor, Third Parties) [1996] 4 MLJ 227 (not folld)

Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor [1981] 1 MLJ 254 (folld)

Kok Song Kong v BSP Co Sdn Bhd [1988] 2 MLJ 440 (folld)

Legislation referred to

Rules of the High Court 1980 O 56 rr 1, 1(3)

V Kumar (*SC Chan* with him) (*Kumar Jaspal Quah & Aishah*) for the plaintiffs.

Leong Wai Hong (*Wong Chong Wah* with him) (*Skrine & Co*) for the defendants.

Haidar J: Enclosure 75 is an appeal to me pursuant to O 56 r 1 of the Rules of the High Court 1980 ('the RHC') by the first defendant against the damages awarded by the senior assistant registrar ('the SAR') on 30 January 1997.

At the hearing of the appeal, the plaintiffs' counsel raised a preliminary objection that the appeal was not properly brought before me as it was issued outside the time as set out by O 56 r 1(3) of the RHC. The counsel for the first defendant, however, contended that the appeal was in order as having complied within the time as prescribed by O 56 r 1(3).

Order 56 r 1(3) reads:

> Unless the Court otherwise order, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less than 2 clear days before the day fixed for hearing of the appeal.

The facts

The following facts are not disputed:

(i) the SAR heard the assessment of damages on 21 November 1996;

(ii) the SAR delivered his decision on 30 January 1997;

(iii) the notice of appeal was filed on 3 February 1997 and the filing fee was paid on the same date;

(iv) the notice of appeal was signed by the SAR on 3 February 1997 and it was sealed on the same date;

(v) the unsealed copy of the notice of appeal was served on the solicitor for the plaintiffs, Tetuan Kumar Jaspal Quah & Aishah on 3 February 1997;

(vi) the sealed copy of the notice of appeal was extracted from the High Court Registry on 6 March 1997 by the first defendant (see encl 82); and

(vii) the sealed copy of the notice of appeal was served on the plaintiffs' solicitors, Tetuan Kumar Jaspal Quah & Aishah on 10 March 1997 (see encl 82) that is, 10 days before the returnable date for hearing of the appeal fixed on 20 March 1997.

The preliminary issue

The issue is centred on the meaning of the word 'issued' in O 56 r 1(3) of the RHC.

According to the counsel for the plaintiffs, though the notice of appeal was filed within the five-day period as prescribed, it was only issued on 6 March 1977 to the first defendant thereby contravening O 56 r 1(3).

The Malaysian Court Practice Rules of the High Court 1980 (1996, Malayan Law Journal Sdn Bhd) at p 72, in dealing with O 6 r 2(1) of the RHC (substantially in pari materia with RSC O 6 r 2) states:

> A writ is effective only when issued and *a writ is deemed issued when it is sealed*. A plaintiff who lodges the correct papers for the institution of the suit and pays the proper fees on a particular date should have as a matter of necessary implication, the writ sealed on or as of, the date. (Emphasis added.)

Two cases namely, *Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor* [1981] 1 MLJ 254 and *Kok Song Kong v BSP Co Sdn Bhd* [1988] 2 MLJ 440 were cited in support thereof.

The word 'sealed' is not defined in the RHC and neither is the word 'issued'.

In *Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor*, a Kuching High Court case, the learned judge citing with approval the case of *Boota Singh v Isman bin Ali* [1957] MLJ 127, agreed that when a writ is sealed, it is deemed to be issued.

Jumatsah's case was quoted with approval by the Brunei Court of Appeal in *Kok Song Kong v BSP Co Sdn Bhd.* At p 441, the Court of Appeal stated:

> The plaintiff lodged the correct papers for the institution of the suit, and paid the proper fees, on 18 April 1984, and accordingly the writ should have been sealed on, or as of, that date. There is no express provision to that effect in the rules, but it is, in our judgment, a matter of necessary implication. As this case shows, the date on which a suit is instituted may be crucial to the rights of the parties. *To have those rights depend on the whim of a court functionary cannot be right. Such a thing cannot be allowed as an admissible feature of a civilized system of jurisprudence.* (Emphasis added.)

Later on in the same page of the judgment, the Court of Appeal cited *Aly v Aly* (1984) 128 Sol J 64 with approval the observation of Eveleigh LJ thus:

> Eveleigh LJ observed that it did not make sense that a party who had done everything required of him by the rules should be penalized for something not done in time by the court. It would be surprising and harsh, he said, if a litigant who had done all that was required of him should be unable to obtain the court's assistance because the court itself had failed in some matter of procedure.

By analogy, therefore, once the notice of appeal in this case has been filed within the time prescribed and duly signed and sealed within the time frame, then the notice of appeal is deemed to have been issued. It follows therefore, on the undisputed facts, that the first defendant has duly complied with O 56 r 1(3) of the RHC, that is, the notice of appeal was issued, that is signed, sealed and dated on 3 February 1997 (within the five-day period). The fact that the notice was 'issued' or extracted by the first defendant beyond the five- day period was something beyond the control of the first defendant, and in my view, the first defendant could not be faulted just because the court itself had failed to 'issue' the notice of appeal to the first defendant within the time prescribed. To use the words of the Court of Appeal in *Kok Song Kong*'s case, 'to have those rights depend on the whim of a court functionary cannot be right. Such a thing cannot be allowed as an admissible feature of a civilized system of jurisprudence'.

A As it is not disputed that the notice of appeal was served on the plaintiff by way of Form 114 not less than two clear days before the date fixed for the hearing of the appeal, the first defendant had complied with O 56 r 1(2) and (3). The appeal was therefore properly before the court and I accordingly overruled the preliminary objection.

B In regard to the case of *Chern Yen Ming & Anor v Teng Ik Ngee Construction Sdn Bhd & Ors (Chern Boon Hong & Anor, Third Parties)* [1996] 4 MLJ 227, relied on by the counsel for the plaintiffs, with respect, though the learned judge agreed to the meaning of the word 'issued' as when the notice was signed, sealed and dated, it would appear that he was of the view that the notice of appeal should be taken out ('mestilah C dikeluarkan') by the appellant in that case within the time frame as prescribed. He went further to say at p 231:

> ... It is the legal duty of the solicitors for the third and fourth defendants to observe the strict provisions of O 56 r 1(3) of the RHC. If need be, it is the duty of that solicitors to pursue the matter of issuing the notice within time D with the relevant court officer ... .

With respect, I am of the view that the learned judge had taken a literal meaning to the word 'issued'. The approach taken in the cases of *Jumatsah bin Daud* and *Kok Song Kong*, in my view, is the correct one. Surely it is not and never intended that a legal duty is imposed on an appellant to see that E the notice of appeal is 'issued' or extracted within the time frame as seemed to be the view of the learned judge in *Chern Yen Ming*'s case. It is something beyond its control and certainly such right cannot depend on the whim of the court officer.

F *Preliminary objection ovveruled.*

Reported by Zahid Taib

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